Merit Contracting, Inc. *and* International Union of Operating Engineers, Local No. 66, AFL–CIO. Cases 6–CA–28848, 6–CA–28886, and 6–CA–28913

March 12, 2001

DECISION AND ORDER REMANDING

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 24, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief answering the Respondent's exceptions, and the Respondent filed a brief in reply to the General Counsel's answering brief. In addition, the General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order Remanding.[2]

The General Counsel's complaint alleges that the Respondent engaged in conduct violating Section 8(a)(1); that it terminated two employees who were union members, Jerald Rodgers and William Goughenour, in violation of Section 8(a)(3); and that it also violated Section 8(a)(3) by refusing to hire 13 applicants for heavy-equipment-operator positions because of their union membership.

The judge upheld certain complaint allegations concerning unlawful interrogation and surveillance, and we affirm those findings. The judge dismissed certain alleged violations, including the 8(a)(3) allegations involving the discriminatory terminations of Rodgers and Goughenour. We affirm these findings with the exception of one dismissed 8(a)(1) allegation, discussed in part below.[3]

Most significantly, the judge found that the Respondent unlawfully refused to hire 9 of the 13 alleged discriminatee-applicants because of their union membership, and he recommended that the Respondent remedy this misconduct by offering them employment.[4] On May 11, 2000, the Board issued its decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20, setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. We have decided to remand this case to the judge for further consideration in light of *FES*, including, if necessary, reopening of the record to obtain evidence required to decide the case under the *FES* framework. We have concluded that a remand is also required in order that the judge may reconsider his prior findings in light of our decision to reverse his dismissal of one complaint allegation and our discussion of issues concerning the Respondent's wage-compatibility policy and the applicants' job qualifications.

1. The additional 8(a)(1) violation

The General Counsel excepted to the judge's dismissal of an 8(a)(1) allegation involving an incident on March 17, 1997, between alleged discriminatee Rodgers and Charles Rush, the Respondent's vice president and general superintendent. We find merit in this exception, and, contrary to the judge, we will find this violation.

In the second week of March, not long after he was hired, Rodgers began to circulate a petition among the employees at his worksite which sought better working conditions for job assignments out of town. The petition did not refer to the Union in any way because, at this point, Rodgers chose to maintain the secrecy of his union-member status. Alleged discriminatee Goughenour, another covert union member hired by the Respondent, was engaged in virtually the same activity at the same time, at a different worksite.

On March 17, Rush approached Rodgers, introduced himself, and said that he had heard from other employees about Rodgers' petition. Rodgers gave him the petition to read, and Rush responded that, "this looks like trouble." In reply to Rush's questions, Rodgers explained that other employees had complained about out-of-town working conditions, that he was trying to help them out, and that he would turn the petition over to the company when he had enough signatures. He also told Rush that another employee—Goughenour—was passing around a similar petition at another site. Rush told Rodgers that if he wasn't happy with the company, "you can go work

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] With respect to the 8(a)(1) violations found by the judge, the Respondent limited its exceptions and supporting argument solely to the question of whether the relevant complaint allegations are consistent with the time requirements of Sec. 10(b). We affirm the judge's rejection of this argument for the reasons set out in sec. III,B of his decision.

[4] We affirm the judge's dismissal of the discrimination allegations concerning the four other applicants.

somewhere else." Rodgers told him that he wasn't going to leave and that he would not stop petitioning. Subsequent to this incident, Rodgers engaged in union-organizing activity with the Respondent's employees.

The judge noted that Rodgers was not engaged in any activities openly in support of the Union on March 17. He found that nothing in Rush's conduct was sufficiently coercive to violate the Act, and he dismissed the allegation. We disagree.

Apart from any activities on behalf of a union, an employee who engages in concerted activities for mutual aid or protection exercises rights protected by Section 7 of the Act. Employer conduct which reasonably tends to interfere with an employee's protected activity violates Section 8(a)(1), regardless of the employer's motive and regardless of the conduct's effect. See, e.g., *Williamhouse of California, Inc*., 317 NLRB 699, 713 (1995).

Rodgers' petition activity was engaged in on behalf of other employees of the Respondent and in conjunction with another employee of the Respondent engaging in similar activity. It was therefore concerted. Further, Rodgers' petition activity was directed at improving the working conditions of the Respondent's employees assigned to out-of-town sites. It was therefore protected. The concerted, protected nature of the activity was known to Rush, the Respondent's vice president and general superintendent. His statements in reaction to Rodgers' activity that "it looked like trouble" and that Rodgers could "go work somewhere else" if he wasn't happy were implicitly threatening, and therefore had a tendency to interfere with Section 7 rights. Accordingly, the Respondent violated Section 8(a)(1). See, e.g., *House Calls, Inc.*, 304 NLRB 311, 313 (1991).[5]

2. The wage-compatibility policy; applicants' job qualifications

In remanding this case to the judge for evaluation of the refusal-to-hire allegations under *FES*, we note two specific issues which warrant reconsideration by the judge. In his decision, the judge found that the Respondent scrutinized the applications it received for indications of "union wages" in prior employment and excluded an entire applicant class based on this practice. He concluded that this exclusionary conduct was "inherently destructive of important employee rights"[6] and that union animus was implicit therein. The judge appeared to rely primarily, if not exclusively, on this finding in concluding that the General Counsel had established that the Respondent's rejection of the nine applicants was unlawfully motivated.

The judge did not clearly explain what he meant by "union wages." The record does not identify any particular wage rates as "union wage rates"; i.e., rates collectively bargained between an employer and a union. The Respondent's stated policy was simply to screen out those applications which listed *any* desired wage rate or prior wages exceeding the $12 to $14 per hour that the Respondent wanted to pay its operators. Correspondingly, there is evidence that the Respondent generally followed this policy.

It is apparent that the judge's reference to "union wages" represented any wages listed in an application, whether requested or previously paid, which were higher than the Respondent wished to pay. However, the Board has held that such a policy can be a legitimate justification for a refusal to hire, in the absence of evidence that it has been implemented in the face of a union organizing campaign or applied disparately to avoid hiring union applicants. See *Wireways, Inc*., 309 NLRB 245, 246 (1992).[7] We leave to the judge on remand an evaluation of the nature of the Respondent's policy consistent with Board precedent.

Regarding the nine applicants' job qualifications, the judge, in accordance with then-existing Board precedent, did not require the General Counsel to show, as part of its initial burden, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. Further, at the hearing the judge precluded litigation of the question of whether the Respondent would have found each of the alleged discriminatees qualified for employment in the absence of discrimination. In the judge's view, this was a matter for the compliance stage of this unfair labor prac-

[5] This additional violation should be considered by the judge on remand in his evaluation of the refusal-to-hire allegations.

[6] See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967).

[7] See also, *J. O. Mory, Inc*., 326 NLRB 604 (1998) (wage-compatibility policy found a valid defense where evidence showed that the employer had rejected several other applicants pursuant to the policy in clearly nondiscriminatory circumstances). Compare *Clock Electric, Inc*., 323 NLRB 1226, 1231–1233 (1997), affd. in relevant part 162 F.3d 907 (6th Cir. 1998) (Board finds the employer's wage-compatibility claim pretextual where no showing was made that it was dictated by budget restrictions or that employees hired in the past had quickly left for higher paying jobs, and the evidence showed that the policy had not been applied uniformly). See also *Donald A. Pusey, Inc.*, 327 NLRB 140 (1998), and *Norman King Electric*, 324 NLRB 1077, 1085 (1997), enfd. sub nom. *Kentucky General v. NLRB*, 177 F.3d 430 (6th Cir. 1999) (in both cases, the employer's wage compatibility policy found pretextual).

Member Liebman has previously stated her view that *Wireways* could be undermining the enforcement of the Act in the construction industry and that a reexamination of that decision is warranted. See *Benfield Electric Co*., 331 NLRB No. 77, slip. op. at 3 fn. 6 (2000); *Northside Electrical Contractors, Inc*., 331 NLRB No. 166 fn. 2 (2000).

tice proceeding, should the Respondent be found liable for the alleged refusal-to-hire violations. As a result, the judge granted the Union's motion to quash the Respondent's subpoena seeking the following information from the Union:

> 1. Showing what equipment [the 13 original alleged discriminatees] have been certified to operate by the Apprenticeship Program run by the International Union of Operating Engineers, Local 66.
>
> 2. All outlines and materials showing course content, training and experience required in order to become a qualified journeyperson under the Apprenticeship Program run by the International Union of Operating Engineers, Local 66.

The judge found that this information would become relevant and material only at the compliance stage, whether the Respondent sought to use it to attack the credibility of the alleged discriminatees who testified for the General Counsel concerning their qualifications, or whether the Respondent sought to prove directly that the alleged discriminatees were unqualified. These determinations by the judge were erroneous in light of the Board's decision in *FES*.

In *FES* the Board made clear that, as a component of its *Wright Line* burden in a refusal-to-hire case, the General Counsel must first show that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered informally to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Once the relevant experience or training is established, the respondent may show that the alleged discriminatees did not meet its specific criteria for the positions, were otherwise unqualified for the positions, or were not as qualified as those who were hired. 331 NLRB No. 20, slip op. 5-6. It is *not* a matter to be left for the compliance stage.

In these circumstances, we reverse the judge's granting of the Union's motion to quash the subpoena with respect to the nine remaining discriminatees, and we leave to the judge on remand an evaluation of the issue of the applicants' qualifications consistent with the Board's decision in *FES*.

ORDER

This proceeding is remanded to Administrative Law Judge Richard H. Beddow Jr. for further consideration under the *FES* framework, and reopening of the record if necessary, concerning the question whether the Respondent discriminatorily refused to hire alleged discriminatees Michael Eutsey, John Hay, Patrick Rice, Ronald Schade, Ken Sisley, Glen Stevenson, Nathaniel Turner, Henry Whipkey, and Thomas Wratcher. The judge shall determine an appropriate remedy if he should find any violation with respect to these nine individuals.

Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental order with regard to the issue remanded here. Following service of this Supplemental Decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

The issuance by the Board of an Order remedying the unfair labor practices found in this proceeding is held in abeyance pending completion of the action encompassed by this remand.

Barton Meyers and *Clifford Spungen, Esqs*., for the General Counsel.

Donald T. O'Connor and *David Gandio, Esqs*., of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW Jr., Administrative Law Judge. This matter was heard in Pittsburgh, Pennsylvania, on November 17 through 21 and December 8, 1997. Subsequent to an extension in the filing date briefs were filed by the General Counsel and the Respondent.[1] The proceeding is based upon a charge filed March 5, 1997,[2] by International Union of Operating Engineers, Local 66, AFL–CIO. The Regional Director's consolidated complaint dated September 2, 1997, alleges that Respondent Merit Contracting, Inc., of Monongahela, Pennsylvania, violated Section 8(a)(1) and (3) of the National Labor Relations Act, by engaging in the following unfair labor practices; Respondent on various dates threatened employees with unspecified reprisals and discipline; interrogated employees about their protected concerted and union activities; created the impression that those activities were under surveillance; and promulgated and maintained a rule prohibiting all union solicitations; refused to hire or consider for hire job applicants Marvin Carter, Ronald Schade, John Hay, Henry Whipkey, Ken Sisley, Nathaniel Turner, Michael Eutsey, Charles W. Szabo, Ray Cumer, Thomas J. Wratcher, Patrick Rice, Glen Stevenson, and William Cernicky; transferred its employee Jerald Rodgers; terminated its employee William Goughenour and failed and refused to utilize a second shift at its Kelly Run jobsite in order to avoid hiring additional employees because applicants for employment with Respondent and the employees of Respondent named above formed, joined, and assisted the Union and engaged in concerted activities.

[1] The Respondent's unopposed motion to correct record (Transcript) is hereby granted and received into evidence as R. Ex. 51.

[2] All following dates will be in 1997 unless otherwise indicated.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as a general contractor in the construction industry in western Pennsylvania and other nearby States. It annually performs services valued in excess of $50,000 at points outside Pennsylvania and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Pennsylvania. It admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Respondent's jurisdictional challenge relative to Section 10(b) of the Act are address below in the discussion section of this decision.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In the fall of 1996, 84 Lumber Company, a national wholesaler and retailer of lumber and building supplies, contracted with Respondent to build or expand stores at locations in several eastern States. Because of the projected need for additional employees to complete this anticipated work, it placed help wanted advertisements in various newspapers in southwestern Pennsylvania and in New York. The ads sought equipment operators; crane, dozer, backhoe, and highlift operators; as well as concrete carpenters and finishers; and ironworkers. On December 3, 1996, shortly after the ads appeared in the newspapers, members of the Union began filing applications with the Respondent for positions as equipment operators.

In late November, Union Business Agent Joseph Beasley told Marvin Carter that the Respondent was doing some hiring and also asked Ronald Schade if he would to apply to work for the Respondent. Both Carter and Schade had been union members for over 24 years.

On December 3,[3] Beasley drove them to Respondent's office and both applicants entered the office wearing union jackets and hats which had the Operating Engineers symbol on them. A young woman working in the office gave them applications which they filled out. When Schade asked her whether the Respondent was hiring, the woman answered that they may be in a couple of weeks, that she would give the applications to her boss who would notify them if they were needed.

Schade's application listed "heavy equipment operator" in the blank for position desired while Carter wrote "Equipment operator." Schade testified that he was unemployed at the time. Both Schade's and Carter's applications stated they were not now employed and that they could start "today." Carter listed a high school but not whether or not he had graduated and he had no other entrees under the education section of the application. Schade listed his school and graduation as well as his graduation from "Operating Local 466 Operating Engineers School Program." Schade listed $18, under salary desired but Carter left the spot blank. In addition he listed as previous employers union contractors Chapman Corp., Anthony Crane, and Long Construction. Schade's application gives three union business agents as references and Carter listed Beasley as a reference (with a phone number) but did not identify him. Carter listed one past employer "Louis Valone Co., 2–95 to 5–95" under the blank for his last three employers and he did not sign the application.

John Hay, who was unemployed at the time, received information about the Respondent from the Union's dispatcher and went to pick up an application in "late" November. Thereafter, he mailed an application dated December 3, to the Respondent. Pertinent details from his application and those of other applicants are set forth in the chart below.

Hay testified that he has been a member of the Union since 1992, took part in the apprenticeship program from 1992 until his graduation in 1996, and that he is qualified to run bulldozers, excavators, backhoes, rubber tire scrapers, tractor pan scrapers, bobcats, graders, and grade-alls. He did not hear from the Respondent but called the office on January 30, and asked for John Hilty. The secretary said he was in a meeting but took Hay's name and number and said he would call back. When no call was forthcoming, Hay called back later that afternoon, was told Hilty was unavailable, that his application was on file and that they were not hiring at the time. He had no further communication from the Respondent and was not interviewed or hired.

Ken Sisley who was unemployed at the time, read the Respondent's classified advertisement in the Valley newspaper and also was called by the union dispatcher. He went to the Respondent's office wearing his union hat on December 4 and asked for an application, which he filled out at the office. Sisley has been a union member since 1979, and is a journeyman operator experienced with high lifts dozer, excavator, backhoe, forklift, pan (scraper), crane, picker, and other equipment. On about January 6, Sisley received a message from John Hilty on his answering machine. Sisley called Hilty who told him that they had lost his application and that he should come back in to fill out a second one. He returned on January 31 and filled out another application but heard nothing further.

William Whipkey is a third year apprentice with 6 years of prior experience operating heavy equipment including, dozers, pans, high lifts, graders, hoes, and backhoes. He obtained an application on December 4, from the union dispatcher when he stopped down at the union hall inquiring about work. After filling out the application, he mailed it to the Respondent. After not hearing from the Respondent Whipkey called on January 31, and was informed him that the company was not then hiring but that his application was on file.

Raymond Cumer has been a union member since 1982, and operates dozer, high lift, pan (scraper), backhoe, forklift, and compactor. About December 2 or 3, he received a call from the dispatcher who told him about applying with Respondent. On December 5 he went and received an application form, which he filled out and returned. On about February 21, he phoned the Respondent and spoke with a woman was told that his ap-

[3] Carter put a different date on his application but testified it was in mid-December and I find that Schade's application accurately reflects the correct date.

plication was still on file. Cumer never heard back and was not interviewed or hired.

Nathaniel Turner has been a union member for 10 years and operates most equipment including dozers, pans (scrapers), high lifts, and backhoes. On December 3 or 4, he received call from the Union and he agreed to apply for work at the Respondent. On December 5, Turner went by himself and filled out an application on which he listed his graduation from the Operating Engineers apprenticeship school.

Charles Szabo has been a member of the Union since 1974 operating backhoes, track excavators, high lifts, drag lines, cranes, rock trucks, dozers, and other equipment. He was called by the Union and asked whether he would like to apply to work for Merit. He went to Respondent's office on December 11, and filled out an application dated that same day. After not hearing from Respondent, he called in February and asked the secretary answering the phone whether his application was still on file. He was informed that it was and that it would be retained for 6 months. Szabo was not interviewed or hired by Respondent.

Thomas Wratcher has been a union member since 1990, is experienced as a heavy equipment operator, and has operated among other things, tractors, dozers, cranes, trucks, and highlifts. He received an application from the Union and mailed it, dated December 26, to the Respondent. After not hearing anything, he called around February 14 and was told that his application was on file. He was not contacted and was not interviewed or hired by the company. His application lists the equipment that he had worked on his last three jobs, including forklift, highlift, back hoe, cherry picker, and excavator.

Michael Eutsey has been a union member since 1992, is qualified to run a loader, bobcat and forklift, and is presently attending the union apprenticeship program while working for various contractors. In late December, the Union told him that the Respondent had an ad in the newspaper for operators and asked him to apply. Eutsey was aware that the Respondent was a nonunion contractor because he had applied there in 1995. On December 26, he went by himself to the Respondent's office where he asked a secretary if they were hiring and how much they were paying. She told him that they were hiring but that she did not know when or how much they would be paying. She said they were accepting applications, and he filled out an application and gone it to her. Eutsey's application stated that he was applying for either an operator or laborer position, showed his attendance in the Union's apprenticeship program, and listed union employers including Beaver Excavating Co. and Welded Construction Co. He never heard from the company.

Patrick Rice has been a union member for 29 years and is experienced in running all dirt equipment other than cranes. Rice, who lives in Monongahela (Respondent's location) was called by the dispatcher who said he heard that Respondent was hiring and that if he wanted work to pick up an application. He said that he was unemployed at the time and that union members who are out of work are permitted to obtain nonunion work when work is slow. He got an application form at Respondent's office on December 27, took it home and then hand returned it the following Monday, December 30. Respondent was unable to locate the application and on cross-examination questioned Rice regarding its contents.

Rice testified that his application noted that he had completed the Union's 4-year apprenticeship training program, that he had been a member of the Union for 29 years, and listed under "former employees" three well known union contractors who work in western Pennsylvania where he was paid $19.63 an hour. He said he sought a position "operating equipment" wrote that he could start any time with a desired salary of $15 on hour.

On January 2, 1997, Schade and Carter returned to the Respondent's office again wearing union jackets and hats. They spoke with a secretary who took their names and said that the company would be hiring in a couple of weeks. On January 29, they again returned to the office in union jackets and hats and again left their names and phone numbers.

On January 3, Turner received a telephone call from the Respondent asking that he come in for an interview. The next day he met with Hilty and a "dirt boss" and was asked about his experience. He told them that he ran most all equipment including scrapers, dozers, and the CAT backhoe, that the had his least experience on trackhoes, and no loader experience. At the company's request he agreed to take a physical and drug test. These tests were set up by the company to be taken on January 23 and 30.

Glen Stevenson has been a union member for 10 years and a journeyman operator for 6 years experienced in operating excavators, dozers, compactors, rollers, and other dirt moving equipment. On January 14, he was called by the dispatcher who told him that the Union was trying to organize the Respondent and asked Stevenson, who was unemployed, if he would go and apply for work. On January 16 he went to the company office wearing his ujnion jacket and hat. Upon arrival at the office he spoke with a man on the porch (identified at the hearing as John Hilty), and asked whether they were accepting applications. Hilty responded that they were and asked Stevenson whether the Union had sent him down and Stevenson replied, [no]. A secretary gave him an application and said that he could fill the application in at home and mail it in. Stevenson took the application home, filled it out and addressed it to the address written on the form and stamped the envelope. His wife then took the envelope containing the application to the post office to mail in the way that he regularly mails letters but never heard further from the company. The Respondent was unable to locate any application submitted by Stevenson in its files but its counsel questioned him at the hearing regarding the contents of the application. Stevenson testified that he listed on the application that he was a journeyman operator for Local 66, that he had completed a 4-year union apprenticeship program, had worked for (union) contractors J.A. Jones and Lane Construction, and probably wrote "prevailing rate" for salary desired.

William Cernicky was a business agent for the Union for 15 years until his retirement in October 1997. Before becoming business agent, Cernicky operated all types of equipment including backhoes, loaders, dozers, and high lifts. Cernicky presently is suffering from Huntington's disease which affects some of his physical abilities but he asserts that he was capable

of performing work as an operator, that he could climb into the machines, drive, handle controls and do fine grade work. On January 30 he went to the Respondent Merit's office along with Turner, who that day had completed a physical exam for Respondent.

On January 30, after his physical, Turner returned to Merits office with Bill Cernicky and met with Hilty. Turner asked if he was now going to be hired. Hilty answered that he would be put on a panel and called off that panel. Turner then told him that if he were hired he was going to try to organize the company. Turner did not hear back from the company until approximately 9 months later when, shortly before this hearing, Respondent contacted Turner about a job. Turner, who was employed at that time, did not respond to Respondent's telephone call. While talking with Hilty, Cernicky requested and was given an application, which he filled out in his car and returned to Merit's office that same day. When he returned the application he asked the secretary if they were hiring and she said yes. Cernicky did not hear from Merit and later called the office where he was told that his application was still valid but never heard further.

On February 17, Schade and Carter returned to Monogahela, along with William Goughenour and stopped at a local restaurant. Goughenour then drove alone to the Respondent's office to apply for work. Goughenour has been a journeyman member of Local 66 for 15 years and is experienced on all forms of heavy equipment, including grade-alls, excavators, backhoes, trackhoes, both rubber tire and track highlifts, all forms of bull dozers, pans, cherry pickers, and incidentals on small machines. Goughenour was wearing no union clothing or insignia and made no mention of his union affiliation where he got an application form. Goughenour completed the application and returned it to the Employer by mail. Nothing on the form related to his affiliation with the Union and the prior employer's he listed all of whom he had actually worked for, were not union employers.

After Goughenour returned to the restaurant, Schade and Carter, both wearing union hats and jackets, drove to the Respondent's office and spoke with a secretary. The secretary said that she did not know anything about their applications and took their names and phone numbers. Schade asked to speak with her boss, but she said that he was not there. Standing in the office at the same time were two other men. Schade and Carter then returned to the restaurant and while standing outside, they observed a care with a "Merit 1" license drive up to the restaurant. The two men who were at Merit's office with them got out of the car and Goughenour, who also saw the car subsequently recognized one of the men as Hilty. Neither Carter or Schade heard further from the Respondent and they was not interviewed or hired.

On February 24, Goughenour was called for a job interview with Hilty. After the interview, which consisted primarily of Goughenour's explaining his experience and abilities, he was offered employment on the spot. Initially Hilty wanted him to begin working at a jobsite in Front Royal, Virginia, as early as the next day, but Goughenour explaining that his wife was ill at the time and he would have to check with her. Goughenour also was introduced to Woody Gysygem, who is overall supervisor of Respondent's dirt operations, including the Front Royal project, and was told to call him concerning his immediate availability for Front Royal. At no time did Goughenour ever undergo a physical or any other form of examination for his job. Later that evening, Gysygem called Goughenour, who indicated he was available to go to Virginia the next day. The following morning Goughenour was unavailable due to car problems. When he contacted Hilty on February 28, he was immediately sent to a jobsite in Hazelton, Pennsylvania, to begin work the following morning. Goughenour worked in Hazelton for 6 days and when the job was completed, he was told to return home and call the company offices. He was immediately sent to work the following day, a Saturday, March 8, at the Kelly Run landfill where he stayed throughout the remainder of his employment with Respondent.

The first two days Goughenour worked at Kelly Run he worked on a 4 p.m. to midnight shift under banks of portable lights which had been erected on the jobsite. After that weekend, there was no further second shift work at Kelly Run. At one point during his employment Goughenour asked the superintendent Frank Kevech, why there were not two shifts working at that site rather than having the employees working 12 hours every day and Kevech assertedly replied that the Respondent did have enough equipment operators for two shifts on the job. On March 12 Goughenour first circulated a petition among the employees which sought more uniform pay scales, better out of town allowances and other benefits. The petition does not mention of Local 66 but speaks in terms of concerted activities among the employees.

Goughenour testified he solicited signatures on the petition, at various times and places including in the parking lot, before and after work, or in the shuttle truck while traveling to the jobsite. He admitted that he also solicited employees on occasions when the flow of work had backed up because trucks were waiting in line to be loaded by the excavator, when worked stopped for blasting or because equipment had broken down and there was a occasion for employees to stand around and talk for a few minutes.

On March 17 Goughenour circulated a handbill among the employees as they congregated at the job trailer at the end of the day and waited for their paychecks. The following week, on March 24, Goughenour distributed another flyer which he passed out among employees as he ran into them during the course of the day. On approximately March 31, Goughenour said he attempted to obtain employee signatures on union authorization cards in the parking lot before and after work as well as during down time in the course of the workday.

Jerald Rodgers has been a union member since 1995. On February 24, he received a call from Beasley who told him that Goughenour had given his name as a referral to the Respondent. Rodgers was given a telephone number and called the Respondent. He spoke with Supervisor Woody Gysegem who directed Rodgers to call the main office the next morning. Rodgers called, spoke with Hilty and told him that Goughenour had referred him. Hilty asked him to come in for an interview and later that day he discussed his qualifications with Hilty and filled out an application. Hilty told Rodgers about their work for 84 Lumber Company on the East Coast but Rodgers testi-

fied that Hilty did not indicate where those jobs were located. Rodgers did not put any information indicating his union affiliation in his application and did not otherwise inform management of any such affiliation. He was not asked to take a physical or drug test and that afternoon, Hilty telephoned Rodgers with an offer, to begin work at the Flexsys jobsite, near Monogahela (Rodgers said he went into the interview believing that he could be assigned out of town, and asked that he be assigned to Hazelton with Goughenour).

At the Flexsys jobsite, Rodgers ran a track hoe, backhoe and skid loader. On March 12 he began a petition drive at the site seeking improved wages and benefits and he showed the petition that day to Supervisor Mike Rush and job superintendent Bill Greenwood. Mike Rush responded to this petition by telling Rodgers that "it wasn't a good idea for me to be doing that, you know, it's trouble" and if he wasn't happy he should go see the people in the office if he wanted more money. Greenwood also told him to go see someone above him at the company if he wanted more money.

On Monday, March 17, General Superintendent Chuck Rush introduced himself to Rodgers and said that he had heard from other employees about the petition. Rodgers testified that after being given the petition to read, Rush said, "th[I]s looks like trouble" and asked Rodgers why he was doing it. Rodgers explained that he was trying to help the guys out, that his coworkers had complained that they should be paid more gas money and per diem for out of town work and that he would turn the petition in to the company once he obtained enough signatures. Rush questioned why Rodgers was complaining since he wasn't working out of town. Rodgers responded that a buddy of his was working out of town who thought it was unfair. When Rush asked him who, Rodgers told him that it was Goughenour who also was passing around a petition. Rush's response was that if was not happy "you can go work somewhere else" but Rodgers said he had no intention of leaving and no intention of giving up.

On March 20, Mike Rush approached him and gave him his work assignment for the day, which included work at Flexsys in the morning and in a nearby church parking lot that afternoon, and said he would be digging up concrete pads to put in pipe and a catch basin at Flexsys the following week. At lunch that day Rodgers picketed at the jobsite entrance, and passed out flyers which stated that Merit was not paying a fair wage.

While picketing, Mike Rush assertedly told him that he should talk to somebody about passing out the petitions and that he was causing trouble. After lunch Rodgers went to the church parking lot assignment. At about 5 p.m., Chuck Rush came by and told him that he was no longer needed at Flexsys and that he should next report to the Kelly Run jobsite. Rodgers asked why he was being transferred and asserted that it was because he was picketing and passing out flyers. Rush denied this claim, and allegedly said that Rodgers was causing trouble, and that if he didn't like it "get the hell out."

On Friday, March 21, Chuck Rush phoned Rodgers at home and asked him to work that Saturday at Kelly Run. Rodgers turned him down, citing a prior engagement. Rush then again told him to report to Kelly Run on Monday, however, Saturday evening Rodgers received a telephone call from Woody Gysegem, telling him to report to Front Royal, Virginia.

Sunday evening Rodgers called Gysegem and questioned why he was being sent out of town, asking whether it was because of his activity picketing and passing out flyers. Gysegem said that he did not know too much about it. Rodgers asked if he could stay local the next day so that he could speak with management. Gysegem declined to call Rush at that late hour but suggested that Rodgers take the next day off. Rodgers called back and said that he would go to the office the next day.

The next morning Rodgers went to the Monongahela office and complained to Chuck Rush that it was unfair to take him off the Flexsys job, that there was a lot of work yet to do. He claimed that he was being sent to Virginia due to the petition that he was passing out and the picketing. Rush continued to direct Rodgers to report to the Virginia jobsite, and when Rodgers asked if Rush minded if he passed out flyers in Virginia, Rush responded, "[Y]ou better think about (the) trouble you are causing." Rodgers later that day informed Rush that he would not accept the transfer, and began picketing at Flexsys.[4]

On April 2, Rodgers engaged in picketing at the Flexsys jobsite. At lunchtime Hilty and counsel David Gaudio came to the jobsite, passed through the gate and were given flyers by Rodgers. Shortly thereafter Hilty and Gaudio returned to the gate. Rodgers asked who Gaudio was and Gaudio identified himself as an employee of Flexsys. Gaudio began to question Rodgers, asking whether he was trying to organize them, whether the Union would want to replace their employees and what was the purpose of the picketing. Gaudio asked "[D]o you have this organizing going on any place else," and when Rodgers said "yes," Gaudio asked, "where" and Rodgers responded that they were organizing also at Kelly Run. Gaudio asked him, "[D]o you have a guy like yourself over there?" and Rodgers told him that Bill Goughenour was organizing at Kelly Run.

The next day Job Superintendent Kevech approached Goughenour before work and told him that he had been up most of the night talking to Company bosses and lawyers about Goughenour's activities on behalf of the Union. Goughenour testified that that the Company had him on audio and video tape (which surprised Kevach), that he had been aware of Goughenour's activity but hadn't said anything but that now the company was on his back and Goughenour was not allowed to engage in any union activities on company property from the time he entered the gate at the bottom of the hill by the parking lot until the return to the parking lot in the evening and that if he continued his activities he would be subject to discipline. That evening after he got home, Goughenour received a phone call from general superintendent Rush who advised him that he had been terminated because he was being "disruptive to the workforce."

III. DISCUSSION

This proceeding involves the Respondent's apparent failure to hire union affiliated applicants for positions as equipment operators, the transfer of one employee who started a petition

[4] The complaint does not allege that Rodgers was constructively discharged by the Company's transfer of him to Virginia.

drive and the discharge of one union activists, as well as certain related 8(a)(1) unfair practice allegation including alleged threats, interrogations, surveillance, and rules against union solicitation.

A. Refusal to Hire Criteria

The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980), *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), however, the foundation of 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941).

Based on the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors,* 290 NLRB 802, 811 (1988), and case cited therein, it is found that in a case of this nature the General Counsel meets his initial burden of proof when it establishes that (1) an individual files an employment application, (2) the employer refused to hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's case, the employer must establish that the applicant would not have been hired absent the discriminatory motive. The qualifications of job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is seeking or accepting applications. However, there is no requirement that the General Counsel show (at this stage of the proceeding) that an applicant has superior qualifications that would mandate his selection for employment. Therefore, a resolution of an applicant's total qualifications beyond his basic suitability for the position involved is not an issue relevant to the basic criteria necessary to prove a violation of the Act.

B. Procedural Matters

On brief the Respondent challenges the Board's jurisdiction under Section 10(b) of the Act to consider allegations concerning alleged Section 8(a)(1) conduct in paragraphs 7 through 13 of the complaint, claiming that no appropriate underlying charge supports such allegations, citing in particular *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989), and *Lotus Suites v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994).

This jurisdictional challenge was not raised as an affirmative defense in the Respondent's answer and it was not pleaded as a preliminary matter at the hearing and, accordingly, I find that it is untimely and its motion is therefore denied on that ground.

Otherwise, I find that the request also should be denied on its merits for the following reasons. In these proceedings three separate changes were filed alleging (1) the refusal to hire several applicants, (2) the discriminatory transfer of Gerald Rodgers and (3) the discharge of William Goughenour, because of their union membership or activities. Paragraphs 8, 9, and 10 related directly to these charges and paragraphs 11 and 12 relate directly to the three preceding paragraphs and allege that each is a violation of *both* Section 8(a)(1) and (3) of the Act.

As noted in *Lovejoy Industries*, 309 NLRB 1085, 1086 (1992), the Board in *Nickles Bakery* held that the preprinted "other act" language on the charge form may not be relied upon to support complaint allegation of "independent" violations of Section 8(a)(1). Here, the allegations in paragraphs (8) through (12) are not independent allegations but are part of "collective" allegations that the Respondent violated Section 8(a)(1) and (3) of the Act. Accordingly, I find that *Nickles Bakery* does not support the Respondent's claim in this respect.

Turning to the separate complaint allegation in paragraphs 7(a) through (d) of the complaint, an evaluation of the *Nickles Bakery* criteria shows that they are "closely related" to the underlying charge and, particularly, that they "arise from the same factual circumstances or sequence of events as the pending charge. First, paragraph 7(a) alleges a January 1997 interrogation of employees at the Respondent's office. Job "applicants" are considered as employees as referred to in the Act and the Respondent alleged 8(a)(1) conduct occurred as the applicants were attempting to apply for the jobs for which the Respondent thereafter refused to hire them. Paragraphs 7(b) and (c) relates to threats to and interrogation of Gerald Rodgers after he began to engaged in protected activity to protest his transfer. Paragraph 7(d) relates to conduct which was precursory to William Goughenour's discharge.

Under these circumstances, the charges clearly are closely related to the separate 8(a)(1) allegations, the Respondent's defenses relate to the 8(a)(3) allegations would have the necessary nexus and I find that the 8(a)(1) allegations clearly arise from the sequence of events, for example, Rodgers and Goughenour both allegedly were transferred or discharged because of the type of protected activity that is alleged as a violation of Section 8(a)(1). Accordingly, I find that the Respondent's jurisdictional contentions are without merit, compare *Nippondenso Mfg. U.S.A.,* 299 NLRB 545, 546 (1990).

On brief the Respondent also request reconsideration of my ruling which granted the Union's motion to quash a subpoena directed to the Union. This subpoena sought the production of information with respect to the 13 job applicants as follows:

> 1. Showing what equipment the [13 salts] have been certified to operate by the Apprenticeship Program run by the International Union of Operating Engineers, Local 66.
>
> 2. All outlines and materials showing course content, training and experience required in order to become a qualified journeyperson under the Apprenticeship Program run by the International Union of Operating Engineers, Local 66.

First, the Respondent asserts that it has a reasonable belief that the material sought is relevant and that it touches on the matter in question. It further argues that the General Counsel asked questions relating to the qualifications of the applicants and that the General Counsel bears the burden, as part of its prima facie case, to establish by a preponderance of the credible evidence that the salts were qualified for the positions for

which Merit was hiring, citing in particular *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818 (6th Cir. 1996).

This case does not arise in the 6th Circuit and I find that it would be improper for me to rely on a court of appeals decision instead of relevant Board decisions on the issues, see *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), in which the Board emphasized that "it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," citing *Iowa Beef Packers,* 144 NLRB 615, 616 (1963). See also *Ford Motor Co.*, 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 993, 996–1002 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979), and *TCI West, Inc.,* 322 NLRB 928 (1997). Accordingly, I shall follow the Board's precedent on the issue and I find that the under the applicable Board criteria noted above the relevance of the qualification issue is primarily one for examination at the compliance stage of the proceeding, see *Fluor Daniel Inc.*, 304 NLRB 970, 981 (1991), and *Dean General Contractors*, 285 NLRB 573–574 (1987).

Otherwise, I find that the material sought in the subpoena is not relevant or material (at this stage) to any applicant qualification issue bearing on the Respondent's conduct in this case dealing with its interactions with the job applicants. In this connection, it is noted that neither its job ad nor its employment application specify any particular qualification and as otherwise discussed below, detailed information about the Union's apprenticeship program has no objective relationship to the Respondent's decision to hire or further process job applications.

The Respondent also argues that the information sought could go to challenge the credibility of those applicant who testified about their qualifications. Here, the various job applicants testified along the line that they took part in or graduated from the Union's apprenticeship program, had experience in operating various type of equipment and had worked for various construction companies as qualified operators. The Respondent's purported inquiry would appear to be a collateral attack on the Union's apprenticeship program and the likelihood of it producing any information that would tend to impeach the testimony of the witnesses in any meaningful way is almost pure speculation. The material sought would not be likely to lead to any significant factual conflict that might impeach a witness testimony in relation to any material fact in dispute. Details about a person's experience and training are those that normally would be explored in employment interviews, communication with references and observation or testing of an applicant on the equipment and here the application process generally did not get to that stage. Where it did, as with Rodgers and Goughenour, the experience asserted was shown to be valid. There is no reasonable basis for thinking that a tangential critique of the information sought would aid in the development or evaluation of the record and, accordingly, my ruling at the hearing is affirmed.

C. Refusal to Hire Union Applicants

The Respondent points out that in 1991, it entered into a project agreement with Local 66, on a Sony plant project and that in its second year of operation, it entered into a collective bargaining relationship with the UMWA for all of its mine sites and prevailing rate work. Chuck Rush testified that, currently, a majority of its employees are members of the UMWA, that it traditionally has hired members of labor organizations, that Les Trbovich and Gary Greedan, who both testified that they were working at Merit's Kelly Run jobsite with Goughenour, were members of the USWA and the UMWA, respectively, that it hired USWA members Rasel, Tedrow, and Donley as equipment operators for the 84 Lumber jobs. Accordingly, it argues that the general counsel failed to establish that Merit possessed union animus and that such animus contributed to the decision not to hire the 13 "salts," citing *Bay Control Services*, 315 NLRB 30 (1994).

Hilty, who is responsible for Respondent's hiring (and reports to Chuck Rush), testified that it generally has between 75 and 160 employees, excluding office employees. His standard hiring procedure is to run an ad in the newspaper, collect applications, review those applications, and sort them by classification (such as operator), to be filled. In going through the applications, he attempts to pick out ones that he believes match requirements for a particular position, and he calls those individuals in for interviews. Hilty testified that the hiring criteria he used are: job experience, salary desired, salary made on prior jobs, and the reason the person left their prior job. He does not focus on education and his most important criteria is job experience, with salary desired and how much they have made in the past also being important, however, he admitted that the Union's apprenticeship program qualifies as relevant training for running heavy equipment. As to the individual references, Hilty looks at them only to see if there is a name he recognizes so he can check to see if the applicant is a good employee.

He screens the applications in a classification (such as operators), into three piles, each with its own folder. The first contains the best applicants, those he would call first, and the third pile contains the worst applicants. He then sorts the applications in the first pile in order of attractiveness and uses those to set up interviews and tries to have three interviews set up for each opening. Hilty attempting to have applicants for dirt operator jobs interviewed by himself, Gysegem and Chuck Rush if they are available, but he sets up the interviews without first clearing with them. Hilty runs the interviews, and makes notes during the interviews on the standard interview form. The last question he asks during the interview is, "What skills do you have for the job you're applying for?"

Because of they anticipate work from 84 Lumber. It put help wanted ads in many of the local newspapers in southwestern Pennsylvania (as well as Watertown, New York), late in November 1996. Originally, management was talking about hiring nine crews, each with four or five operators and late in 1996, Hilty was directed to get people "interviewed, physical[ed], [and] prepared to go to work" but he asserts that he had problems hiring qualified employees and having them available when they were needed. In December, owner Clem Gigliotti, directing that he set up "benches," or panels, with at least 10 individuals on them who had completed their interviews and physicals, and were ready to go to work. Gigliotti told Chuck Rush, "[N]ot to wait until the last minute to do their interviews. And to run through the interviews and put, say 10 men on the bench like you would a ball team, to be ready to go when

needed." On January 24 he had an operators bench list of 13 names, 3 of which were for foreman/supervisor positions and one was listed as a foreman/operator. Three of these declined the job before physicals were set and one, Robert Barganti, was hired as a supervisor without a physical and Hilty acknowledged that employees are not always required to have physicals, and that, if there is no time, physicals are often bypassed. Of the remaining nine on the panel one was not offered a physical because of his alleged limited skills, one declined, and one did not show up, leaving the following six:

(1) William WhiteDozer
(2) Charles Large580
(3) Nate TurnerPan
(5) Michael FiniakLoader/Dozer
(6) Stephen BudnerLoader
(8) Boyd CutwrightDoz, Load, Hoe

Turner is the only union affiliated applicant on the list and he was not called its work until shortly before the hearing began.

Although the Respondent had a past project agreement and some affiliation with other union and other employees with some union membership the issue here is of a more narrow focus, one that must look at its hiring practices when it was directly faced with an active organizational drive and applications for employment by a rush of numerous union operators in response to its ads. See *J .E. Merit Constructors*, 302 NLRB 301, 304 (1991). Here, shortly after the alleged discirminatees started to appear at the Respondent's office in Union hats and jackets to file applications, the Respondent changed, in part, its regular hiring practices and set up a panel or bench of prospective employees and, with one exception, these union affiliated applicants never made it past Manager Hilty's initial, subjective screening process, a process in which the applicant salary made on prior jobs was said to be a prominent criteria. Thus, if the applicant honestly reported his prior union scale wage level, he would automatically be exclude from further consideration because that wage would be in excess of the Respondent's wage levels (Turner's last wage was $15 an hour and the previous one was $20 but he also put $12 an hour as the salary desired). The "practical effect" of the Respondent's application review practice precluded selection for interview and employment of union members and supports an inference that the union applicants were not considered simply because of their union affiliation, see *P.S.E. Concrete Forms*, 303 NLRB 890 (1991).

While Hilty and the Respondent present the appearance of a benign attitude towards unions, it is unnecessary for the General Counsel to show blatant actions on the part of an employer in order to demonstrate antiunion animus. As discussed below, the Respondent does not persuasively show valid reasons why it did not consider union applicants for interviews or employment. I otherwise find that any burden on the employer to seek or obtain from an applicant objective information such as whether he would accept a lower wage level or if he is skilled in operating specific pieces of equipment would be slight in any case where an applicant has filed a reasonable informative application form and it clearly would outweigh the the Respondent's practice of engaging in subjective speculation that applicants would not work for less than they made previously or were not skilled in operating some types of equipment.

Here, management's memo to Hilty called for him to interview and have 10 operators "ready to go to work," however, only six were processed to the physical stage where they were on the "bench" at the end of January. Apparently, no additional applications of union or other individuals, were reviewed to bring the bench up to strength. Moreover, in February and March, the Respondent proceeded to hire Rodgers and Goughneour (who appeared to be nonunion appllicants) as well as eight other operators who did not go through the panel process and it ignored the bench (and Turner), except for Barzanti who immediately was hired as a foreman/operator without a physical. Previously, three other operators, plus Ralph Bailey also were hired in December and January without going through the "bench" procedure and six or more other "non-bench" operators in addition to Rodgers and Goughnour were hired in February and March.

The record thus shows that the Respondent essentially ignored it asserted new hiring procedure, ignored union affiliated applicant (except for its interview of Turner who, it is noted, is also is a minority applicant), while hiring nonunion applicant including "covert" applicants Goughenour (who listed a desired wage of $14 an hour and past "operator" salaries of $13.50 to $11), and Rodgers (a referral by Goughenour who listed past "operator" salaries of $14 to $10 an hour and requested $14). Thus, only union experienced applicant's who lied about their past union involvement could hope to be hired and I find that this demonstration of disparate treatment between these two classes of applicants is sufficient to support an inference of animus.

I also find that the expressed disqualifying criteria for the Respondent's screening of applications (past experience at union wages), effectively precludes consideration of an entire class of applicant and it constitutes discriminatory conduct and is a practice inherently destructive of important employee rights. Accordingly, I find that animus is implicit and can be found here even without specific proof of antiunion motivation, see *Merit Constructors*, supra, and *Great Dane Trailers*, 388 U.S. 26, 34 (1967).

The Respondent's newspaper ad for November 11 was as follows:

> Taking applications for operators, Crane, dozer, backhoe and highlift. Experience necessary. Willing to travel.

Some applicants saw the ad and the Union's business agent and dispatcher otherwise alerted unemployed union members to the opportunity and asked them to apply. Between December 3 and January 30, 13 overt union members filled applications and one was called for an interview. None were hired although the Respondent otherwise hired 15 other individual for equipment operator positions between December 1, 1996, and April 30, 1997, including covert union members Goughenour and Rodgers.

As noted above, 13 overt applications were filled by union members, of which those filled by Rice and Stevenson were not found in the Respondent's files. Otherwise, I credit their testimony that they prepared applications with the information set

forth above and that Rice hand delivered his application to the Respondent while Stevenson's wife mailed his correctly addressed envelope and application at the post office thereby establishing a presumption of delivery.

The basic information on these applications as well as the "covert" information given by applicants Goughenour and Rodgers is summarized in the following chart:

Information on Applications on file with Respondent[1]

Name	Applic. Date	Position Sought	Start Date	Salary Desir.	Union Trade School	Former Employees	Past Salary
M. Carter	not signed or dated	Equipment operator	today ,	blank	blank	1 Union con.	blank
R. Schade	12/3	heavy equip operator	today	$18	yes	3 union con	$21
J. Hay	12/3	heavy equip. operator	ASAP	negotiable	yes	3 union con.	14.89 to 19.26
K. Sisley	12/4, 1/30	operator	open	open	yes (12/4)	3 union con.	19 (1/31)
W. Whipkey	12/4	operator	12/1	?	2 yrs.	2 union con.	14.89 (oiler)
R. Cumer	12/5	operator	anytime	blank	blank	union of op. eng. Local 66	-
N. Turner	12/5	operator	12/5	12	'yes	3 union con.	15 to 20.43
C. Szabo	12/11	Equipment operator	12/11	20	blank	hire out of #66 Op. Eng.	
T. Wratcher	12/26	equipment/ operator	immediately	joumeymans operators rate	yes	2 union con.	19
M. Eutsey	12/26	operator or laborer	12/26	blank	attending	3 union con.	8 to 21
P. Rice	12/30	Equipment operator	anytime	15	yes	3 union con.	19.63
G. Steven-son	1/16			prevailing rate	yes	2 union con.	-
W. Cernicky	1/30		anytime	800	yes	illegable no dates	blank
W. Goughenour	2/18	Equipment operator	now	14	blank	3 nonunion con	13.50 to 11
J. Rodgers	2/25	operator	blank	14	blank		14 to 10

[1] All indicated they were not presently employed except Carter, Eutsey, and Cemicky, who left the space blank.

On brief the Respondent argues extensively regarding the job qualifications of the various applicants except Schade, Turner, and Wratcher. In substance, the Respondent substantially misses the mark in pursuing this issue. First, there is no showing (except for Turner) that Hilty or anyone else ever considered job qualification before rejecting the application for an interview or further consideration. Although Hilty asserted that "job experience" was important, he also testified that he first pretty much just looks at the front (of the application) and doesn't look at the back unless the position desired doesn't say what category is being applied for. The only place on the front of the application that would relate to qualifications would be the bottom line under education and calls for any Trade school and this line is where most of the applicants indicated their graduation from the Union's apprenticeship program. Hilty said that only when he is going to set up interviews would he take a better look and get to job experience, which he alleges is the most important, and would set up three interviews for every job opening.

Here, I find that Hilty basically was testifying in an abstract sense inasmuch as there is little corroboration of any actual adherence to his alleged practices. Moreover, he admittedly

relies primarily on references from know sources (a criteria that as a practical mater also inherently tends to preclude consideration of union affiliated applicants), Hilty did not testify as to what he "did" with these applications but merely offered rationalizations about his practices. What he actually did was to exclude all suspected union affiliated applicants, except Turner, from further consideration at a time when he hadn't bothered to review information about their experience and had little information about their qualifications. He did, however, generally have available information (that he assertedly disregarded) which showed that most of the applicants had graduated from the Union's apprenticeship program and I find that such training especially when coupled with some showing of experience as an operator with other companies establishes a presumption of basic job qualification that cannot simply be disregarded without at least some further investigation or inquiry.

Moreover, when the Respondent's owner, Clement Gigliotti, testified that he never instructed his staff not to hire union personnel, he specifically added that he probably preferred union people because he believes that 70 percent of them would be "qualified" as compared with 20 percent for applicants "off the street." Accordingly, Hilty described practices in the winter of 1986–1997 appears to be inconsistent with the Respondent's usual evaluation of an applicant's suitability.

Turning to a review of the individual applications and the information that Hilty actually was confronted with, I find that the Respondent's asserted reasons for not further reviewing such application, for not arranging interviews with many of the applicants and for not hiring any of them are inconsistent and unbelievable and therefore pretextual. I agree, however, that several applications are so poorly prepared or otherwise so lacking in basic information that an employer would be justified in failing to give them further consideration, absent some unique circumstances not shown to be present here. I find that Cernicky's application essentially was illegible as well as lacking in reasonable detail. Carter's application was substantially incomplete, was unsigned and undated and had no useful information beyond the cursory identification of the position desired, Cumer's application (filed at the same time as Turners) had no apprenticeship, salary desired, references or former employers (except a reference to Local 66 from 1982), and Szabo's application had no apprenticeship school date or position of former employment and only a reference to "hire out of union #66 operating Eng." Accordingly, I am persuaded that the Respondent's has shown that it would not have reviewed further the applications filed by Carter, Cernicky, Cumer, and Szabo even in the absence of their apparent union affiliation.

Applicants Hay, Sisley, Eutsey, and Whipkey indicated desired salaries as negotiable, open, (blank) and (?). Rice said $15 an hour and Stevenson wrote "prevailing rate," thus all of this entrys were essentially the equivalent of Goughenour and Rodgers, who sought $14 an hour. Although Schade sought $18 and previously had made $21 and Hay and Wratcher had past salaries shown at $19, without more, it cannot be presumed that a union affiliated applicant would automatically decline employment because of wage expectations. Otherwise, Hilty negotiated the wage levels of those he did hire and no salary was set out in the Respondent's ad. Accordingly, I find that information on past salary or salary desired is not a valid explanation of why the Respondent failed to consider these seven application, see *Norman King Electrical,* 324 NLRB 1077 (1997).

In a similar vein, I find that the Respondent assertion regarding equipment operating experience is inconsistent or otherwise unbelievable. Turner, Rodgers and Goughenour listed experience as "operators" and were hired or at least called for an interview. Rice and Stevenson were both experience "dirt" equipment operators, Sisley and Eutsey listed past experience as operators, Eutsey also said loader (similar to a highlift), Hay had loader and pan and Schade had crane and trackhoe listed. Although Whipkey had listed oiler and drive for his last three jobs it appear that Goughenour duties when hired included both driving a large truck and operating the trackhoe and otherwise Whipkey had past experience in operating dozers, highlights and backhoes, thus, he reasonably could be considered to have the "experience" specified in the Respondent's ad.

Here, the Respondent made no attempt to inquire of any union applicant (except Turner) about their specific experiences or skills, dispute their apparent qualifications and basic experience.

In relation to the "requirement" of the Respondent's ad, the information relative to qualification refers only to "experience necessary," with a logical tie in with experience as an operator with the operation of a crane, dozer, backhoe or highlift equipment being of further interest.

Hilty testified that he ran the ad again after the first 2-week run in late November because he didn't get a sufficient response. Yet the Respondent acted inconsistently with this assertion by failing to act on as many as eight applications it received from union applicant between December 3 and 11.

The Respondent made no meaningful review of these union connected applications and it had no disqualifying knowledge at the time it rejected the applications for further review and I find that its explanation in this respect appears to be merely seeming plausible "after the fact" reasons and I find that they are pretextual and indicative that the real reason that the applicants were not considered was their union affiliation.

Although the Respondent contend that the General Counsel failed to establish knew that Hay, Whipkey, Eutsey, Szabo, Cumer, Wratcher, Rice, Stevenson, or Cernicky were union members, supporters, or sympathizers, I am persuaded that the record is sufficient to show otherwise. In particular, Stevenson testified that he wore a union jacket and hat when he appeared at Merit's office on January 16 and he had a brief conversation with Hilty before he went into the office to get his application. The Respondent admits that Carter, Schade, Sisley, and Turner wore union identification when they applied and otherwise, the applicants all indicated that they had attended the Union's apprenticeship program (except Cumer and Szabo, who otherwise both said, "hire out of Op. Eng. 66," under former employers). As noted above, when Hilty saw Stevenson in mid-January in a union hat and jacket, he asked Stevenson if the Union had sent him and, under these circumstances, I find that the Respondent suspected or had knowledge that these applicants were affiliated with the Union and that the Respondent has failed to persuasively rebut the General Counsel's showing.

Accordingly, I find that the General Counsel has met his overall burden and shown that the Respondent's failure and refusal to consider and hire the seven discriminatees named above violated Section 8(a)(3) and (1) of the Act, as alleged, see *P.S.E. Concrete Forms*, 303 NLRB 890 (1991).

To the extent that the Respondent argues that it did not need and would not have hired all of the applicants, even if it had chosen to consider these applicants for employment, the matter

of the specific number of jobs is relevant to the compliance stage of this proceeding and does not affect the basic determination of the illegality of its practice inasmuch as these clearly were jobs available at the time of the several applications were ignored and the record shows that between 11 and 15 operators were hired between December 1, 1996, and April 30, 1997.

D. Other Alleged Violations of Section 8(a)(3)

Both Goughenour and Rodgers were hired after they submitted applications that hid their union affiliation. They successfully performed their assigned duties and then also began to overtly engage in concerted or union activities. Thereafter Rodgers was transferred to another location and Goughenour was terminated. The Respondent was aware of their concerted activities and as found above, the record otherwise implicitly demonstrates antiunion motivation that would relate to Goughenour (Rodgers did not disclose his union affiliation until after he refused his transfer). Accordingly, I find that the General Counsel has made a showing sufficient to support an inference that the employees' union or protected concerted activities were a motivating factor in Respondent's subsequent decision to change the conditions of employment. Accordingly, the testimony will be discussed and the record evaluated in keeping the criteria set forth in *Wright Line,* 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.,* supra:

> [A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent points out that its ad recruited applicants for out of town assignments, that the need for an operator at the Flexsys job site where Rodger's worked was wrapping up, that it desperately needed a skilled operator at its Front Royal job site and that it regularly moves employees between job sites as a normal part of its construction business.

Rodgers began work on February 26 at the Flexsys jobsite near Monogahela although he admittedly went to his interview with Hilty expecting to be assigned out of town. He began his petition drive on March 12, and passed out flyers about unfair wages at lunch time on March 20. At 5 p.m., Chuck Rush came by and told him that he was no longer needed at Flexsys and that he should next report to their Kelly Run jobsite. Rodgers asked why he was being transferred and asserted himself that it was because he was picketing and passing out flyers. Rush denied this claim and on Friday, March 21, Rush phoned Rodgers at home and asked him to work that Saturday at Kelly Run. Rodgers turned him down, citing a prior engagement. Rush then again told him to report to Kelly Run on Monday, however, Saturday evening Rodgers received a telephone call from Woody Gysegem, telling him to report to Front Royal. Sunday evening Rodgers called Gysegem, questioned why he was being sent out of town, and said that he would take the next day and go to the office to speak with management. The next morning Rodgers went to the Monogahela office, spoke to Rush and then refused to accept the transfer.

Although there was some work still to do at the Flexsys job site most of the "dirt" work was done and Rodgers admitted that at the end of the week when he was asked if he could operate a boom truck (for the erection of the structure) he said "[N]o he hadn't run one but was sure he could." There were two other operators there at the time and Rush gave a credible explanation that the Flexsys superintendent agreed he needed only two operators if they could operate the boom truck. He and superintendent Gyslgm also explained that they urgently needed an operator at Front Royal and that Rush decided that Rodgers could go inasmuch as the other operator at Flexsys was experienced in operating the boom truck and Rodgers was a good dirt operator who could meet the needs at Front Royal.

Here, I credit Rush's testimony that he told Rodgers' that he was not being transferred because of his passing out flyers and petitions that it was because they needed a skilled operator, probably for a short term. I find that Rodgers was well aware that he would not stay a one job site for an indefinite time and that his employment with the Respondent involved out of town assignments.

Accordingly, I find that no violation of the Act occurred when the Respondent transferred Rodgers to the Front Royal jobsite and I conclude that the General Counsel has failed to prove that the Respondent violated the Act in this respect, as alleged.

With respect to Goughenour's discharge, the Respondent argues that Goughenour began to engage in disruptive behavior during regular worktime and that he was terminated for interfering with the work of other employees.

Goughenour applied for work on February 17, was interviewed on February 24 (and gave Rodgers name to the Respondent as a referral that same day). He was expected to start work at Front Royal on February 18 but was unable to go because of car problems and then was assigned to Hazelton on February 28 and started the next day, Goughenour was transferred to the Kelly Run landfill jobsite near Monongahela, in Elizabeth, Pennsylvania, on Saturday March 8, for a night shift. After two shifts running a large excavator, he was assigned to drive a 50-ton dump truck and was put back on an excavator 8 to 10 days later.

Goughenour began circulating a petition (which did not mention the Union), when he was put on an excavator at the jobsite on March 12 and he talked to 10 or 12 employees about the petition. Goughenour denied that he stopped employees from working when he circulated the petition and contended that he only brought out the petition to be signed when things would back up, when employees were waiting for an excavator to get a truck filled, or when trucks were jammed up, and the employees would stand around and talk about different things. He also claimed that he never got off his equipment to approach a driver who was loaded.

Goughenour first distributed a flyer mentioning the Union on March 24 and he first distributed authorization cards and copies of the Union's contract in the parking lot on March 31. Job Superintendent Kevech first became aware of Goughenour's solicitation when other employees gave him some of the papers Goughenour was handing out. Kevech testified that the other employees "became a little testy" because Goughenour kept bugging them and asked them to sign this and sign that "at all different times." After the first week, Kevech became aware that Goughenour was soliciting employees when he should have been operating his machine and he personally observed a couple of different times that Goughenour was off of his machine and talking to the guys up in their trucks. Kevech did not

speak to him at the time because, as soon as Goughenour saw him, Goughenour got back on his vehicle and the employees dispersed.

Operator Les Trbovich (a former member of Local 126 of the IBEW and a member of the Steelworkers Union) testified that one day when Goughenour was operating the trackhoe loaded Trbovich's truck, he was getting ready to pull out when Goughenour stopped him, got down off the excavator, walked over to the truck, and handed Trbovich a union card and flyer and began a conversation. Trbovich said, "[H]e didn't get out and (Goughenour), spoke to me from the ground, so that he was looking up at me when he spoke to me." Trbovich told Goughenour that he was already in a union that he was not interested. He also said that he thought there was one truck waiting to be loaded while the 4–5 minutes conversation took place. He also saw Goughenour stopping other truck drivers as they were pulling in and handing them a orange flyer, along with a union authorization card and he told Kevech about this. Trbovich said that neither his nor Goughenour's equipment was broken down and that, other than when there are breakdowns, he has not seen employees standing around, stopping equipment, to talk.

Operator Gary Greedan testified that when he loaded Goughenour's truck, Goughenour got off the machine, came up and introduced himself and, started talking to Greedan about wages, and asked if Greedan would consider joining a union. Greedan indicated that he was a member of the United Mine Workers and told Goughenour that he was not interested in signing a petition. He said that after Goughenour talked to him about all kinds of issues, including life insurance and working out of town, and asked if he was happy with the money he was getting, Greedan stated that he told Goughenour that he had to load some trucks and get back to work as there were trucks waiting to be loaded and no equipment was broken down. The conversation he had with Goughenour lasted 5 to 10 minutes and Goughenour also stopped him a couple of other times and talked to him about union type issues and on one occasion when "we were still in the yard in the morning getting the machines ready for work and he came over" and started a conversation lasted "about 5 minutes or so" that they were on company time when the conversation took place, and he was held up by Goughenour in getting started on his work. Greedan testified that, in fact, Goughenour stopped him quite a few times, always approached him on the job. Greedan said that on two or three different occasions he told about Goughenour approaching him and said that he told Kevech that he was getting annoyed that every time he turned around, Goughenour would see him, stop him from working, and want to discuss the Union and wages. Greedan testified that none of the conversations he had had with Goughenour took place while they were congregated together or waiting for a blasting charge to go off.

Operator John Lee Griffith testified that Goughenour stopped him during working time when he pulled his dump truck down into the loading area, Goughenour dismounted his excavator and walked towards him just as he stopped to be loaded, Goughenour stood next to his truck, and started up a 5-minute conversation about coming to a union meeting (neither machine was broken down).

Kevech testified that he did not get involved with employee complaints about Goughenour's solicitation but he informed the office and told Hilty that Goughenour was getting off his machine, and every time he did so it was slowing down the job. Hilty stated that, after a conversation with owner Clement Gigliotti about the disruption of work being caused by Goughenour, he instructed Kevech to make sure that Goughenour understood that he could not solicit during working time. I credit Kevech's testimony that he gave a group warning to this effect at the start of the shift and warned Goughenour individually two or three times and did so again at 7:30 a.m. on April 3, Goughenour's last day. Despite this last warning, Goughenour was again off his machine soliciting other employees when Kevech and Gysegem came over the hill in a pickup truck and surprised Goughenour standing on the ground talking to two other employees on a truck. Kevech then reported this to Hilty. That evening Goughenour was called at home by Chuck Rush who told him he was laid off for disrupting the workforce at Kelly Run.

Here, I find that superintendent Kevech was a credible witness who displayed little if any animosity toward Goughenour, except with relationship to disruption of work. I find that Goughenour's bare assertion that he was "waiting for oil" on April 3 and his attempt to minimize the nature of his solicitation efforts in his testimony is unbelievable in the face of the credible testimony by several of the workers who were so put off by his disruptive actions that they complained to management. Accordingly, I find that Goughenour did in fact disregard Kevech's warning on April 3 and that he was observed engaging in solicitations and disrupting the Respondent's operations during normal work hours. Under these circumstances, I find that the Respondent has persuasively shown that it had a legitimate reason for terminating Goughenour, that it had occasionally terminated other employees for cause and that it would have terminated Goughenour for these reasons even in the absence of Goughenour's sometimes protected solicitation during non work times.

Accordingly, I find that no violation of the Act occurred when the Respondent terminated Goughenour for engaging in disruptive conduct during normal working hours and I conclude that the General Counsel has failed to prove that the Respondent violated the Act in this respect, as alleged.

E. Alleged violations of Section 8(a)(1)

On brief the General Counsel fails to present any agreement relative to any illegal interrogation on or about January 4. As the record otherwise shows that on this date Hilty interviewed some applicants and merely asked one person who had a union jacket on "if" he was in the Union and "how long," I find no evidence that would show a violation of the Act. Accordingly, this portion of allegation 7(a) will be dismissed. On January 16 Stevenson went to obtain an application and was met and questioned by a man (Hilty) on the porch. Stevenson was wearing a Union jacket and hat and when he asked if they were taking applications, Hilty confirmed that they were and then asked if the Union had sent him down there and how long he had been a member of the Union.

The standard for determining whether interrogation is coercive is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985). It also is well established that questioning a job applicant regarding his union membership or sympathies is inherently coercive and thus interfere with Section 7 rights. See *Electro-Tec, Inc.,* 310 NLRB 131, 134 (1993). Although the Respondent contends that the encounter was amicable and

not threatening or coercive, the words must be evaluated in the light of the circumstances. Here, the circumstances include the fact that the application that Stevenson filed (see my finding above), was "lost" or otherwise not filed with the Respondent collection of concurrent applications and I find that the "losing" of any application after questions about the applicants union membership would reasonably give that applicant the impression that his application efforts were futile because of the questions and therefore the questions become coercive and interfere with the applicants section 7 rights. Accordingly, I find that the Respondent is shown to have violated Section 8(a)(1) of the Act in this respect, as alleged.

On March 17, General Superintendent Chuck Rush looked at the petition Rodgers was circulating (which did not mention the Union), and told him that the petition looked like trouble and asked him why he was doing it. After being told that it was on behalf of employees that were traveling out of town, Rush asked Rodgers (who was not out of town) who was complaining, and suggested that if Rodgers was unhappy he could "go work somewhere else."

Here, Rodgers was openly pushing a petition to management about higher wages and out of town per diem and had placed himself in the self-appointed position of spokesperson for the employees. He voluntarily showed his petition to Rush and it reasonably appears that Rush's questions sought a response to the issues raised by Rodgers and were not coercive. At this time Rush had no knowledge that Rodgers was engaged in any union activities and I am not persuaded that the circumstance support an inference or otherwise show that Rush's conversation would rise to the level of coercive behavior. According, I find no violation of the Act in this conversation.

Rush and Rodgers had another conversation on March 24 when Rodgers went to the office to complain about being transferred to the Front Royal, Virginia jobsite. Rodgers initiated the conversation by asserting that it was unfair that he was taken off of the Flexsys job and asked if he was being transferred because of his petition and picketing. Rodgers testified that Rush "asked where he was coming from, what was his point, did he work for a union and was he trying to organize the company or what." Rush testified that he responded to Rodgers reference to the petition by saying he "didn't give a shit what he did as far as that went, that the petition wasn't the reason," and that the reason was that "we needed a skilled operator down there." Rush also testified that at that point in time he had heard nothing linking Rodgers to the Union. Here, I find that Rodgers' assertion that Rush asked about the Union is not consistent with Rush's other words and actions and I am not persuaded that he asked Rodgers about the Union. Rush testified with a credible demeanor and otherwise, I find that Rodgers was the aggressor and was attempting to bait Rush into making some imprudent remark. Under these circumstances, I find that there is insufficient evidence to show that the Rush's response was coercive or that it violated Section 8(a)(1) of the Act and, accordingly, this allegation also will be dismissed.

Respondent's in house counsel, David Gaudio approached Rodgers as he was picketing at Flexsys and, pretending to be a Flexsys employee, questioned Rodgers about his purposes and about the presence of other union supporters at Merit job sites. The General Counsel states that it is not alleged that Respondent violated the Act by questioning Rodgers as to the nature of the picketing at Flexsys but it contends that Gaudio however went beyond such reasonable inquiries. Rodgers testified as follows:

> When he come back, after I give him a flyer, he says, are you trying to organize here, and I says, yes. He says, well, how many guys would this 66 be replacing. I said, well, we wouldn't be replacing nobody. He said, well, what's the purpose of you doing this. I says, to get better wages, benefits and working conditions.
>
> He says, well, do you have this organizing going on any place else. I said, yes. He says, where. I says, Kelly Run. He says do you have a guy like yourself over there. I said, yes. He says, well who's that. I said Bill Goughenour. He kind of looked at John Hilty and says, do you know him. Hilty said yes.

Gaudio described this same conversation with additional detail about his question about who the Operating Engineers were, being an attempt to loosen Rodgers up so he could find out why he was there. As pointed out by the General Counsel, Gaudio did not deny that he asked about other job sites and also asked if there was another "guy like yourself over there," and Rodgers affirmatively identified the Kelly Run jobsite and Goughenour. The Respondent's brief makes much of the legitimate purpose that drove Gaudio's questions, however, regardless of that purpose I find that the objective evidence shows that Gaudio's actual inquiry when beyond proper limits when he asked about organizing at other job sites and, elicited the identity of the other organizer. Accordingly, I find that the General Counsel has shown that this interrogation violated section 8(a)(1) of the Act as alleged in the amended complaint.

Supervisor Mike Rush, the brother of General Superintendent Chuck Rush, worked at the Flexsys jobsite under Job Superintendent Bill Greenwood. Rodgers alleges that on or after March 12 he showed his initial petition to other employees and to "foreman" Rush and asked him if he would like to sign it and that Rush said "it wasn't a good idea for me to be doing that, you know, it's trouble." Rodgers showed his flyer (no mention of the Union) to Rush when he began to picket on his lunchbreak on March 20 and testified that Rush told him that he should "talk to someone about passing them out, that I was causing trouble" and that "if you don't like working here, why don't you go find another job."

Mike Rush testified that Rodgers was a real good operator and wasn't causing any trouble there and he denied have any conversation where he discussed Rodgers' causing trouble. He did testify that he told Rodgers that "if he wasn't happy to go down and see the people at the office if he wanted more money." I find Rush's testimony to be credible and, otherwise, I find that the benign circumstances surrounding the alleged threat are insufficient to allow an interference of any realistic threat that Rodgers himself was "trouble" or would suffer some unspecified reprisal because of his actions and, accordingly, I find that the allegations of paragraph 7(b) are not proven and should be dismissed.

On April 3, Kelly Run Job Superintendent Kevech approached Goughenour at the start of the day to discuss Goughenour's solicitations on behalf of the Union. Goughenour testified that Kevech told him that he had been up most of the right with company bosses and lawyers discussing what to do about Goughenour's union activities. He added a comment that they had Goughenour on video and audio tape and said he was surprised because he didn't know the Company

was taping although others were (a reference to neighboring property owners who opposed the land fill).

Kevech then told Goughenour he "was no longer allowed to engage in any Union activities on Company property from the time we entered the gate . . . until we got back to the parking lot after 7:00 p.m. in the evening and that if I continued doing anything after that he would have to send me to the office for discipline." Kevech testified with apparently truthful answers to questions but he was asked and answered only indirectly and ambiguously about telling Goughenour and the employee in general about video taping by jobsite neighbors. Kevech's subjective testimony that his comments about video filming were not designed to influence Goughenour's union activity is of no relevant value. He did not rebut Goughenour's credible and objective testimony that Kevech specifically said that the company had Goughenour on video tape. Under these circumstances, the remarks clearly give the impression that Goughenour's specific activities were under surveillance. Accordingly, I find that the Respondent is shown to have violated Section 8(a) of the Act as alleged in paragraph (d)(1) of the complaint.

On cross-examination, Goughenour confirmed that Kevech's warning as to his union activities was limited to "company time," that Kevech "knew it was all right for me to solicit during my own time, at lunch and stuff like that," and he confirmed that he understood that he could solicit while he was not on working time. It also was established that there was no regular lunchtime (employees understood that they ate in their machines when they had an opportunity), that the employees were on company time when they were transported from their parking area through the gate until they returned and that other employees had complained about being bothered by Goughenour while they were in transit, on company time. Under these circumstances, the admonishment to Goughenour about "company property" is the same as company time. Kevech otherwise credibly testified that he referred to "company time" and also told Goughenour at that time that he could take his lunch break and talk to himself, "because you can't stop the other guys from working." Thus, the Respondent expressed rule was communicated and applied in such a way that it was direct to worktime and interruption of others working and, accordingly, I am not persuaded that there is sufficient evidence to show a violation of Section 8(a)(1) of the Act as alleged in paragraphs 7(d)(2) and (3) of the complaint, see *MTD Products*, 310 NLRB 733, 739 (1993), and, accordingly, these allegations also will be dismissed.

F. Ending of Second Shift

Kevech testified that the first two days Goughenour was on the Kelly Run job site, he worked "on a Friday, and it was the afternoon shift. We had [a] deadline to beat by Sunday, so we worked Friday, the second shift. And, Saturday, second shift, and got the deadline done." Then the employees went on steady daylight, working at least 10 hours a day with days they worked from daylight to dark depending on what the guys wanted to do at the time and we worked as many hours as we could.

Kevech said employees worked 6 to 7 days a week and when Goughenour came to the Kelly Run jobsite, Merit had a deadline to meet, i.e., dig "a new road into a new cell that was being developed." Kevech's testimony otherwise indicates that there was not enough normal work for two shifts, without also needing additional supervision, which was scarce, and without antagonizing the current employees by taking away some of their work and giving it to new employees on a second shift. The General Counsel does not argue this allegation in its brief and I find that the Respondent has persuasively shown that it had a legitimate business reason for its actions unrelated to any anti-union motivation. Accordingly, this allegation also will be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating an applicant and an employee about union membership and activity and creating the impression that an employees union activities were under surveillance by telling him that the Company had him on videotape; Respondent has interfered with, restrained, and coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. By engaging in a pattern or practice of screening job applicants to determine suspected union sympathizers and refusing to consider applicants for employment based on previous employment with union businesses or for other suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discriminated against job applicants including Michael Eutsey, John Hay, Patrick Rices, Ronald Schade, Ken Sisley, Glen Stevenson, Nathaniel Turner, Henry Whipkey, and Thomas Wratcher, based on their suspected union sympathies, it will be recommended that Respondent offer them employment and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[5]

Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel, Inc.,* 304 NLRB 970, 981 (1991), and *Dean General Contractors*, 285 NLRB 573–574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

[5] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act I issue the following recommended[6]

ORDER

The Respondent, Merit Contracting, Inc., Monongahela, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating applicants and employees about their union membership and union activity; and by creating the impression that employees union activities are under surveillance.

(b) Refusing to consider for employment job applicants for the position of equipment operators because they are members or sympathizers of the Union or because they worked for employers which had union contracts.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Eutsey, John Hay, Patrick Rices, Ronald Schade, Ken Sisley, Glen Stevenson, Nathaniel Turner, Henry Whipkey, and Thomas Wratcher employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days of service by the Region, post at its Monongahela, Pennsylvania facilities and all current job sites copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operation at the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since , the date of the unfair labor practice found in this proceeding.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating applicants and employees about their union membership and union activity and by creating the impression that employees union activities are under surveillance.

WE WILL NOT refuse to consider for employment job applicants for the position of equipment operators because they are members of sympathizers of the Union or because they worked for employers which had union contracts.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees employees in the exercise of the rights guranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Michael Eutsey, John Hay, Patrick Rice, Ronald Schade, Ken Sisley, Glen Stevenson, Nathaniel Turner, Henry Whipkey, and Thomas Wratcher employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

MERIT CONTRACTING, INC.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sc. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."